IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 258

CARMEN BEACH,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INDEX

CITATIONS

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The petitioner, Carmen Beach, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered June 18, 1945 (App. 21) affirming petitioner's conviction for violation of Section 2 of the Mann Act. This case was formerly heard by this Court on petition of the United States decided February 26, 1945, No. 620, October Term, 1944, 65 S. Ct. Rep. 602, which reversed and remanded the prior judgment of the Court of Appeals for further proceedings.

OPINION BELOW

The opinion in the Court of Appeals is not yet reported but is set out in full in the Appendix hereto. (App. 21)

JURISDICTION

The judgment of the Court of Appeals was entered June 18, 1945, (App. 21). The jurisdiction of this Court is invoked under Section 240 A of the Judicial Code as Amended by the Act of February 13, 1925 (28 U.S.C.A. 347) and Sec. 269, as amended (28 U.S.C.A., Sec. 391). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether an admittedly "highly improper" statement of Government counsel constituting reversible error can be excluded from review because the statement was not stenographically reported and despite an affidavit covering the same filed of record.

2. That the petitioner was denied a fair trial and due process of law because:

(a) The crime charged was not proven and many other offenses not charged were injected into the case in a highly prejudicial manner;

(b) That out of a four hundred page record of testimony only 27 questions and 27 answers pertained to the charge upon which petitioner was convicted;

(c) That the only witness against the petitioner involving the charge upon which she was convicted was an accomplice and that the trial court refused to indicate such to the jury but in fact stated that such party was not an accomplice.

STATUTE INVOLVED

The pertinent provisions of the Mann Act are set forth in the *Appellant's Brief (P. 3)* in Case No. 620, October Term, 1944, in the Government's Appendix A, pages 26 to 28.

STATEMENT*

Carmen Beach was charged with four violations of the Mann White Slave Traffic Act consisting of taxicab trips from 15th and Rhode Island Avenue, N. W., to the Raleigh Hotel, Roger-Smith Hotel, Wardman Park Hotel and Hamilton Hotel, all within the District of Columbia. It was charged that she transported one Dorothy Smitley for the purpose of prostitution to such places on October 1st, 5th, 13th and 18th, 1942. The proof showed such alleged violations to have occurred on October 27th, "latter part of October," "November 1st or 2nd," and November 6th. The only evidence as to the violations on all four counts was that of the witness Smitley, an admitted prostitute (Tr. 55) and informer in a previous transportation charge in a Baltimore case (Tr. 55, 57) who said she received one-half of the proceeds of each transportation (Tr. 23, 24). The Government produced by the same witness testimony of relations with men in defendant's apartment, not related to transportation (Tr. 13), and numerous other alleged trips to other hotels by the same witness (Tr. 29). The witness had been in jail nine days while in Baltimore, without being charged, had discussed the evidence she gave in the trial with the F.B.I. agents (Tr. 55, 57), who had advised her she could be prosecuted (Tr. 123-131) and that it would be "better for her health" if she got out of the business she was in (Tr. 22-123). The prosecution introduced the testimony of Hope Alonzo, an admitted prostitute, who testified substantially that the witness Smitley lived for three days (Tr. 136) one time and one week another time (Tr. 137) to the knowledge of the witness, with the defendant. Three F.B.I. agents testified that they saw the witness Smitley in the hotel lobbies charged in the indictment on dates approximately a month variant from the dates charged (Tr. 87, 88, 106, 111). One agent saw the defendant, with the

* "Tr." references in the statement refer to the stenographic transcript of the testimony filed herein and not to the "Transcript of Record" referred to herein as "R. —."

witness Smitley, in the lobby of the Hamilton Hotel on November 1st or 2nd, 1942 (Tr. 106). Motion was made for directed verdict at the end of the government's case, on the ground that the evidence was insufficient, that the White Slave Act did not apply to transportation wholly within the District of Columbia, the variance in dates charged and proven, and conflict in government witnesses' testimony which could only be speculated upon by the jury (Tr. 167-183). Such motion was denied and exception taken. The defendant's husband, a naval petty officer for 26 years, testified that he had been in the apartment of defendant regularly during the time covered by the testimony of witness Smitley's testimony and denied her statements as to the activities testified to by her (Tr. 217-224). He was then engaged to be married to defendant and married her December 18, 1942. He was asked by the prosecuting attorney whether he was a co-respondent (Tr. 225), and whether he lived with the defandant while she was married (Tr. 229), to which objection was made, mistrial requested and exception duly taken (Tr. 227, 229).

After direct examination of defendant (Tr. 256-269) the prosecuting attorney cross-examined the defendant (Tr. 269 to 370—over 100 pages) on matters other than those charged and beyond the scope of direct examination, asking her if she had ever been "arrested" or "charged" with disorderly conduct, a misdemeanor (Tr. 377), if she had ever danced nude at a stag party (Tr. 275 to 279, 296 to 302), ever danced for a moving picture (Tr. 300) and many other extraneous matters (Tr. 269-370). In his closing argument to the jury he stated that if the defendant was acquitted "10,000 American soldiers will be in danger of contracting venereal disease through prostitution here in Washington." The charge of the Court limited the weight of the testimony of the defendant by specific reference, more so than that of any other witness. The Court instructed the jury that the prosecuting witness, as a matter of law, was not an accomplice, then proceeded to give an erroneous

charge upon accomplices, and limited in such charge the actions of the prosecuting witness in engaging in fornication, prostitution, and other crimes to "moral guilt" only. The Trial Court characterized the case in the charge to the jury as "a serious case" and an "important" case to the Government and defendant.[1] The verdict of the jury was "not guilty" as to three of the four counts and "guilty" as to the third count in the indictment charging transportation by taxicab from 15th and Rhode Island Avenue, N. W., to the Hamilton Hotel at 14th and K Street, N. W. (3½ blocks). The defendant was sentenced one to three years and a fine of twenty-five hundred dollars; was refused bail on appeal and was in jail from the time of the verdict, June 25, 1943 until after the decision below on July 24, 1944 at which time she was allowed bail.

The stenographic transcript of all the evidence was refused inclusion in the bill of exceptions by the trial judge on the ground that only that part of the evidence to which exception was taken could be included. The lower court permitted the lodging of the stenographic transcript and the transcript was filed in this court in the prior hearing in Case No. 620, October Term, 1944. References herein to stenographic transcript are indicated by "Tr."

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a "highly improper" statement by Government counsel could not be reviewed where not stenographically reported and that an affidavit filed in the Record and not denied by the Government was not sufficient to be considered.

2. In not reversing the case because of the denial of a fair trial and due process of law because:

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[1] See Charge of Court—last volume of stenographic transcript.

(a) The crime charged was not proven and many other offenses not charged were injected into the case in a highly prejudicial manner.

(b) That out of a four hundred page record of testimony only 27 questions and 27 answers pertained to the charge upon which petitioner was convicted and did not prove the elements of the crime charged.

(c) That the only witness against petitioner involving the charge upon which she was convicted was an admitted voluntary accomplice and that the trial court refused to indicate such to the jury but in fact stated that such party was not an accomplice.

3. In refusing to reverse the judgment of conviction.

REASONS FOR GRANTING THE WRIT

1. Argument by Government Counsel as to Venereal Disease Not in Evidence.

The Court of Appeals below stated:

> "No. 5 calls our attention to a statement said to have been made by Government counsel in its closing address. If the statement was in fact made, it was *highly improper*, and should have been met with a rebuke from the court, but we are wholly unable to say whether the statement was in fact made, or to know the circumstances under which it was made, for there is nothing in the bill of exceptions in relation to the subject, and an inspection of the transcript, which we have made, shows clearly that the arguments of counsel were not stenographically reported, and in bringing this matter to our attention counsel relied upon defendant's affidavit and also newspaper statements, which of course we cannot consider." (Italics supplied)

It will be noted that the Government has never denied this statement in the record.

Although the argument of the prosecuting attorney was not reported and that portion of it assigned as error was

excluded from the Bill of Exceptions by the lower court, because of failure of defense counsel to take exception, the affidavit of the defendant in the Motion for New Trial indicated that the following is a summation of the argument and prejudiced the defendant. An affidavit of defendant stating such is in the record: (See also Times-Herald and Washington Post, June 26, 1943.)[1]

> "In his closing argument after the statement by the defense attorney indicated above, the prosecuting attorney stated to the jury:
>
> 'Send Martin that message and 10,000 American soldiers will be in danger of contracting venereal disease through prostitution here in Washington.'"

In Viereck v. U. S., decided March 1, 1943, this court (318 U. S. 236, 63 S. Ct. 561) stated the following:

> "As the case must be remanded to the district court for further proceedings, we direct attention to conduct of the prosecuting attorney which we think prejudiced petitioner's right to a fair trial, and which independently of the error for which we reverse might well have placed the judgment of conviction in jeopardy. In his closing remarks to the jury[2] he indulged in an appeal

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[1] Times-Herald, June 25, 1943:
"Acquittal of Carmen Beach Martin, sultry defendant in Washington's lurid vice trial, yesterday was urged as a fitting gift for her sailor-husband, at the same time that the prosecution was demanding her conviction 'lest we disease 10,000 soldiers by permitting prostitution in the District.'"
Washington Post, Friday, June 25, 1943:
"Why I wish we had 100,000 more like him and so would General MacArthur.
"Don't tell me that a man in that kind of uniform would permit prostitution right under his nose.
"Prosecutor Margolius rose at this point to address the jury.
"Send Martin that telegram," he said solemnly, "and 10,000 American soldiers will be in danger of contracting venereal diseases through prostitution here in Washington."

[2] "In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our

wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. The trial judge overruled, as coming too late, petitioner's objection first made in the course of the court's charge to the jury.

"At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' *Berger* v. *United States*, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314. Compare New York Central R. Co. v. Johnson, 279 U. S. 310, 316, 318, 49 S. Ct. 300, 302, 303, 73 L. Ed. 706.

"Reversed."

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death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps.

"This is war. It is a fight to the death. The American people are relying upon you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.

"As a representative of your Government I am calling upon every one of you to do your duty."

2. Insufficient Evidence to Justify Conviction.

Motion for directed verdict was made at the close of the government's case on the basis of, among other grounds, insufficient evidence to establish the crimes charged (Tr. Ev. 167-183). Exception was duly taken (Tr. Ev. 183).

It will be noted that the indictment charged transportation to the Hamilton Hotel on October 13, 1942, that the witness Smitley testified as to an alleged 3½-block taxi trip to the Hamilton in the "forepart of November", that the witness Malloy said he saw the defendant in the Hamilton Hotel lobby on November 1st or 2nd. As to each count of the indictment the proof did not comply with the indictment. *Not one count was proven on the date charged, nor within a few days!* Certainly the government witnesses knew the same facts at the time of the grand jury inquiry as at the time of trial, yet the defendant was denied the opportunity to prepare a defense to specific charges on specific dates. Her trial counsel had to prepare his defense as the case progressed. Any evidence prepared to show alibi, impossibility of presence on date charged, or to rebut the evidence of the prosecution on the dates charged, was wasted effort on the part of defense counsel. By his motion to strike, his motion for directed verdict, his motion for mistrial, his constant objections to the variance in the dates, he was entitled to a mistrial or at least a continuance and specific dates and times upon which he could base a defense. The government cannot now be heard to say that it may prove an offense at any time within three years (as alleged at the trial) and not be bound by the rules of fair play in proof of crimes charged. The sixth amendment to the Constitution that the accused be apprised of the crime charged includes the time as well as place and the government cannot claim one date and prove another knowing that the defendant is being misled and placed at unfair advantage.

Take the evidence, outside of the variance in proof as to time, and it will be noted that as to the count upon which conviction was had, that the essential elements of the crime charged were not proven. The testimony of the prosecuting witness Smitley as to the charge upon which conviction was obtained consisted of twenty-seven answers to the same number of questions (from a record of over 400 pages!):

"Q. Now, you mentioned the Hamilton Hotel?
A. Yes, sir.
Q. When did you go there?
A. It was in the forepart of November.
Q. And why did you go to the Hamilton Hotel?
A. For the purpose of prostitution.
Q. Who did you see there?
A. There was an Army officer and a civilian.
Q. And did you go there with any one?
A. Yes, sir; Carmen went with me.
Q. Where were you before you went to the Hamilton Hotel?
A. In the apartment.
Q. And did you know where you were going when you left the apartment?
A. Yes, sir. She had told me to get dressed; that we were going to the Hamilton Hotel.
Q. Why did you go to the Hamilton?
A. For the purpose of prostitution.
Q. How was Carmen dressed on that occasion?
A. She had on a silk fox coat.
Q. And what were you wearing?
A. This short fur jacket.
Q. Where did you go when you got to the Hamilton?
A. On the sixth floor, I believe.
Q. You believe the sixth floor?
A. Yes.
Q. And did you go to a particular room?
A. Not that I remember—I don't remember the room.
Q. You don't remember the room?
A. No.
Q. What did you do after you got there?
A. We had breakfast; then we went to bed.
Q. Who went to bed?

A. Carmen went to bed with one man, and I went to bed with the other man.

Q. In separate rooms or the same room?

A. In the same room.

Q. Had you ever met those men before?

A. No, sir.

Q. Do you know their names now?

A. No, I don't.

Q. Were you paid anything for that visit?

A. Yes, sir.

Q. What were you paid?

A. I don't know; I didn't collect the money.

Q. Who collected the money?

A. Carmen did. (Tr. Ev. 22-23.)

* * * * * * *

Q. How did you get to the Hamilton Hotel from 1322 Fifteenth Street?

A. By taxi.

Q. Who paid for that fare?

A. Carmen did.

Q. Did you have any conversation about where you were going with Carmen before you left the apartment?

A. Yes, sir; she told me to get dressed; she told me we were going to the Hamilton Hotel, that is all. (Tr. Ev. 24.)

* * * * * * *

By Mr. Margolius:

Q. How many times were you at the Hamilton?

A. Just once.

Q. This same occasion?

A. Yes, sir." (Tr. Ev. 25.)

The entire evidence upon which this conviction was based were conclusions of the witness that she went to the Hamilton Hotel "for the purpose of prostitution"; that she went 3½ blocks in a taxicab; that the defendant paid the fare; that relations were had in the same room by the witness and the defendant with two men and that the witness did not know the amount paid, nor collect the money, but that the defendant collected the money, and that the defendant told her "to get dressed; she told me we were going to the Hamilton Hotel, that is all." The fundamental proof neces-

sary to show the crime charged was lacking in that after stating a date not alleged in the indictment, that both had relations in the same room with two men, that it was the conclusion of the witness that the visit was for "the purpose of prostitution," but that she did not *see* any money paid, nor that she was induced to go by the defendant for any particular purpose to enable a showing of intent to transport for an immoral purpose, that it may have been a social visit in view of the statement that the parties had breakfast with the two men and that the relations with the men were or may have been determined as an afterthought,[1] that the greater part of the answers were the result of leading questions,—certainly no defendant should be incarcerated upon such testimony.

The general testimony of the witness Smitley was vague, biased, conclusions of the witness and not evidence of facts, inconsistent and unreliable. For example: "I was sent out on so many dates that I can't say which was which or when was when" (Tr. 50); "I don't recall any dates" (Tr. 63); she was arrested in the York Hotel in this city with her "boy friend," not her husband (Tr. 52), had been going with him six months; her husband was in the army (Tr. 34); her child stayed with her parents in Arlington, Virginia, while she lived in Washington in a room near Washington Circle on Pennsylvania Avenue (Tr. 33, 38, 37); had been going with her boy friend during the time she claimed defendant had been sending her to various hotels (Tr. 52); was held at the Woman's Bureau three days without a charge being placed against her (Tr. 54, 55); had been practicing prostitution in Baltimore (Tr. 55); talked to the F. B. I. agents the first night while in custody for nine

[1] "To justify conviction, there should be convincing evidence of the intention to transport the woman for immoral purposes, and that it was formed before the woman reached the state to which she was being transported. If the intention referred to did not exist before the woman reached the state to which she was being transported, but was formed after reaching the state in which the illicit relationship is had, conviction under the act cannot be had. Sloan v. U. S., 287 F. 91." (Alpert v. U. S., 12 F. (2d) 352, 354)

or ten days in Baltimore as a material witness against a cab driver charged with "transporting" a woman (Tr. 55, 57); had not had any charges placed against her in Baltimore or Washington (Tr. 60) and was released after testifying against the cab driver (Tr. 60); kept her money with Carmen Beach (Tr. 67); had an argument with Carmen (72); and that same night was taken to the Women's Bureau (Tr. 73); when she was released from Baltimore jail came to Carmen's house with the F. B. I. agents to get her clothes (Tr. 74); that Carmen gave her part, but held the rest for rent due by the witness (Tr. 75); which was corroborated by the witness Johnson (Tr. 104); could not remember the one friend she told she was working at Carmen Beach's dress shop (Tr. 44); but had a lot of friends (Tr. 44); that she worked three days for the defendant at the dress shop at the rate of $25 a week but never asked for or received her pay (Tr. 45); said she paid no board or rent while living at her apartment (Tr. 11); but made no protest or denial as to the claim of the defendant for rent when her clothes were withheld in front of the F. B. I. agent (Tr. 75, 104); went to the Mayflower the whole two and one-half months she was with the defendant, two or three times a week (Tr. 29, 30); to the Burlington Hotel once or twice a week (Tr. 31); but only once to the Hamilton (Tr. 25); only once to Wardman (Tr. 25); only once to the Roger Smith (18); only once to the Raleigh (Tr. 15), (the four hotels charged), but did not recall the dates she gave to the F. B. I. agents (Tr. 63); did not remember the dates she gave to the grand jury (Tr. 64).

Her memory was bad, but convenient; her bias was shown; her inconsistent testimony is obvious; her testimony being based upon fear of prosecution is clear; that she was an informer is unquestioned and admitted; that she practiced prostitution on her own is admitted by her and obvious as to her living a twenty-minute bus ride from her child and her parents in her own room near a well-known prostitutes' rendezvous—Washington Circle; she was known by repu-

tation as a prostitute by the F. B. I. for two or three months (Tr. 117); how could her testimony be considered as the sole evidence upon which to convict?

3. Rulings and Jury Instructions as to Accomplice Testimony Were Insufficient, Misleading and Erroneous.

The trial court confused and misled the jury in his instructions on the question of the testimony of accomplices. The jury was charged as follows:

> "Now, in this case there are two witnesses who, strictly speaking, under the law could not be accomplices, yet who upon the stand have morally admitted their guilt with respect to certain offenses. You are instructed that the evidence of such persons under our system of law is admissible, but that you are to scrutinize the same with care, and it is to be received with caution."

The question of the credibility of the testimony of accomplices has been settled in the District of Columbia in White Slave violations by the case of *Freed* v. *U. S.*, 1920, 49 App. D. C. 392, 266 Fed. 1012. In that case, nothwithstanding the omission of counsel to preserve the point, by specific objections and exceptions, the Appellate Court recognized the prejudicial errors of the trial court and remanded the case for a new trial. The facts indicated that a 20-year-old Washington taxi driver had been indicted under the provisions of the Mann White Slave Act for transporting to nearby Virginia two men and three women all of whom later appeared at the trial and testified against him. For his service the driver was compensated by a commission and also the fare charged. The Court of Appeals held as follows:

> "Coming back to the present case, unquestionably the jury might have found that each of the three women who testified was an accomplice as to the others. Bennett v. U. S., 227 U. S. 333, 339, 33 Sup. Ct. 288, 57 L.

Ed. 531. Not only were these witnesses accomplices as to one another, but under the evidence they might have been found guilty of conspiracy. United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915D, 281. The testimony of the two male members of the party was even more tainted, for unquestionably under that testimony their conduct was as culpable as that of defendant. The fact that they so freely implicated themselves in testifying against this defendant is significant, especially as it does not appear that either has been prosecuted. The situation confronting the trial court, therefore, was unusual. There was no direct evidence that was untainted. While it is not improbable that the same result would have been reached, had the court cautioned and advised the jury as to *the danger of convicting upon the uncorroborated testimony of accomplices*, it is not for us to speculate upon this question and resolve it against the accused. The charge of the court fell far short, in our view, of the requirements of the situation. It amounted to nothing more than the general admonition, which it is proper for the court to give in all cases.

"The question which the defendant sought to have brought to the attention of the jury, presenting a material, if not vital, issue in the case, was not even mentioned. *Had the court defined an accomplice, and brought sharply to the attention of the jury the character of the government's testimony against the defendant, it cannot be doubted that his counsel would have been in a better position to present his case to the jury, and who may say that the point of view of the jury might not have been different.* While the request included only two of the witnesses, it was sufficient to bring to the attention of the court the fact that some of the witnesses, at least, might be considered accomplices, and hence that the jury should be cautioned and advised concerning such testimony. When we come to consider that in many jurisdictions it is a positive rule of law that no conviction may be had upon the uncorroborated testimony of an accomplice, the importance of the rule in this and other jurisdictions, requiring caution and advice in this connection, is apparent. The jury may convict without corroborat-

ing evidence, but in a case like the present the accused is entitled to have the court first caution and advise the jury.

"As to the failure of the defendant to include in his request all of the witnesses who might have been regarded as accomplices, see Skuy v. U. S., 261 Fed. 316, where the Circuit Court of Appeals for the Eighth Circuit, speaking through Circuit Judge Sanborn, said:

> 'The contention that proper objections were not made, and proper exceptions were not taken, to permit the consideration in this court of the issues which have been discussed, has not escaped attention, but it fails to convince. Hall v. United States, 150 U. S. 76, 80, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; Waldron v. Waldron, 156 U. S. 361, 380, 381, 382, 15 Sup. Ct. 383, 39 L. Ed. 453. And even if it were tenable, this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this court without objection, exception, or assignment. Wiborg v. United States, 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; August v. United States, 257 Fed. 388, 391, 393, 168 C. C. A. 428.'

"Believing that the defendant was not accorded the fair and impartial trial to which he was entitled, and that his interests may have been substantially affected, we are constrained to reverse the judgment and award a new trial. Surely, if it was the duty of the trial court to caution and advise the jury in the respects pointed out, and we are certain that it was, nothing short of reversal of the judgment will save the defendant from the harm that may have resulted from the want of such caution and advice." (Italics supplied.)

The rule in the *Freed* case has continued to date, especially where the prosecuting witnesses in an alleged White Slave violation are self-confessed prostitutes. Dorothy Smitley and Hope Alonzo testified to long periods of prostitution under the most aggravated circumstances. The witness Dorothy Smitley on whose testimony the appellant

was convicted on a single count of a four-count indictment, according to the testimony, was a married woman whose husband was away in the armed forces and whose child was virtually abandoned to the care of her grandparents in nearby Virginia, while Dorothy lived alone in the District of Columbia within less than three miles of the residence of her child. Dorothy also admitted a promiscuous life of prostitution in Baltimore, as well as having engaged in acts of adultery at a local hotel with a soldier. There was no doubt, according to the evidence, in Dorothy's mind as to the alleged destination of the taxicab ride and under no broad construction could she ever be regarded as an innocent victim.[1] Her testimony, on reflection, becomes more brazen when it is realized that her legal guilt has so far gone unpunished by the same Government which knows of her violations and placed her on the stand, vouching for her credibility as a witness.

The Trial Court caused further confusion by charging the jury as follows:

> "Now in this case there are two witnesses who, strictly speaking, under the law *could not be accomplices*, . . . You are instructed that the evidence of such persons under our system of law is admissible, but that you are to *scrutinize the same with care, and it is to be received with caution.*" (Italics supplied.)

An intelligent juror would be unable to appreciate upon which horn of the dilemma the charge presented he should base his judgment of the character of the testimony being offered by a self-confessed prostitute, liable for the

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[1] In the case of Lee v. U. S., 1929, 59 App. D. C. 33, 32 F. (2d) 424, two women had been innocently transported by a private automobile from Florida to the District of Columbia to become waitresses and during the journey one of the girls had driven the car. The Appellate Court held in substance that the mere driving of the automobile by one of the girls did not make her actions those of an accomplice where she had no knowledge of the actual purpose of the transportation. By the facts of the Lee case the character of the girl was definitely not an associate or participant in a crime.

substantive offenses of fornication, adultery, and conspiracy. Such a juror might very well ask himself, did the charge mean that the witness was not an accomplice and, accordingly, should not require corroboration? On the other hand, he could ask with equal candor, if the Court has charged us that her testimony should be scrutinized with care and received with caution, is not the Court telling us in substance that she is an accomplice? Beyond that confusion a more serious and grievous error was committed when the Trial Court in the same portion of his charge dealing with the character of the nature of accomplice testimony stated:

> "Now, in this case there are two witnesses who, strictly speaking under the law could not be accomplices, yet who upon the stand have *morally* admitted their guilt with respect to certain offenses." (Italics supplies.)

Instead of following the force and effect of the *Freed* case which recognized clearly the unreliable and self-exculpating character of the testimony of those self-confessed prostitutes, the Trial Court failed to point out to the jury their actual legal guilt. By the use of the expression "have morally admitted their guilt," their confessed crimes of fornication, adultery, conspiracy and prostitution were nullified in the minds of the jury and the jury was misled into believing that no act of those witnesses had resulted in any crime.

In the case of *Egan* v. *U. S.*, 52 App. D. C. 384, 393, 287 Fed. 958, involving the offense of bribery, the Appellate Court followed the same rule and held as follows:

> "It is error to convey to a jury great fundamental principles of law, essential to the protection of the citizen accused of crime, in such an indefinite manner as to nullify its importance in the minds of the jurors."

It is submitted that because of the insufficient, misleading, and erroneous charge given by the Trial Court to the jury,

that reversible error occurred. The Court of Appeals based its reason for refusing to reverse on the ground that no exception was taken.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Attorneys for Petitioner.

July 1945.

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

No. 8561

CARMEN BEACH, *alias* CARMEN MARTIN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the District Court of the United States for the District of Columbia; Matthew F. McGuire, Associate Justice.

On Mandate of the Supreme Court.
Decided June 18, 1945.

Mr. James R. Kirkland, with whom *Mr. Nathan M. Lubar* was on the brief, for appellant.

Mr. Bernard Margolius, Assistant United States Attorney, with whom *Messrs. Edward M. Curran*, United States Attorney, and *Charley B. Murray*, Assistant United States Attorney, were on the brief, for appellee.

Before GRONER, C. J., and EDGERTON *and* ARNOLD, JJ.

GRONER, C. J.: Appellant was indicted and convicted of a violation of the Mann Act. On appeal to this court we held that the Act was inapplicable to transportation wholly within the District of Columbia (144 F. (2d) 533). On certiorari the Supreme Court reversed[1] and remanded to us to pass

[1] 65 Sup. Ct. 602 (Feb. 26, 1945).

upon the other grounds for reversal urged by appellant. The grounds so urged, and not previously passed upon, are as follows:

That the trial court erred: 1. In instructing the jury on the question of the testimony of accomplices;

2. In refusing to permit adequate examination of prosecuting witness to show the promise of Government immunity;

3. In the admission of prejudicial evidence in relation to the character of appellant's husband;

4. In the improper admission of evidence of an arrest of the defendant for violation of the traffic laws;

5. In permitting an improper statement by Government counsel to the jury in his closing address;

6. In the Judge's charge to the jury;

7. In allowing unfair and prejudicial cross-examination of the defendant; and

8. In the failure of the evidence to show the commission of the crime.

We have carefully examined the record in relation to the several matters urged as error in the respects above mentioned and are of opinion that they are all without merit. With relation to Nos. 1 and 6, it is enough to say that the record shows no objection made at the trial to the court's charge to the jury, and the charge itself does not appear in the Bill of Exceptions.[2] Similarly with respect to No. 7, no exceptions to the rulings of the court on cross-examination were taken or preserved in the Bill. Moreover, an examination of the charge and the questioning, which we have made to safeguard the substantial rights of the appellant, convinces us that these contentions are without merit.[3]

No. 2, concerning the restriction of cross-examination of the prosecuting witness, appears to us to be without substance. The Government witness, an F. B. I. agent, had interviewed prosecuting witness while she was being de-

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[2] See Rule X, Supreme Court, Rules of Practice and Procedure in Criminal Cases, 292 U. S. 660, 664 cf. Moder v. United States, 61 App, D. C. 300, 62 F. (2d) 462, cert, denied, 288 U. S. 599; Feinberg v. United States, 2 F. (2d) 955, 956; Gantz v. United States, 127 F. (2d 498 (C. C. A. 8); Buessel v. United States, 258 Fed. 811 (C. C. A. 2); Davis v. United States, 38 F. (2d) 631 (C.C.A. 10); Smith v. United States, 38 F. (2d) 632 (C.C.A. 10); Metzler v. United States, 64 F. (2d) 203, 209 (C. C. A. 9); Hood v. United States, 43 F. (2d) 353 (C. C. A. 10).

[3] Cf. Gantz v. United States, supra, at 504. See Judicial Code Sec. 269, 28 U. S. C. Sec. 391; Feinberg v. United States, supra.

tained in Baltimore by Maryland authorities, in connection with another case, and had obtained from her information that presumably later led to the arrest of appellant. Appellant's counsel sought to obtain from this witness a statement that the agent had promised her immunity in consideration of her agreement to testify against appellant. The question was entirely proper and a frank answer should have been returned to it. But our reading of the Bill of Exceptions shows that the court had on at least three or four occasions advised counsel and the witness that the question could be asked and should be answered. But for some reason which is not apparent counsel was not willing to ask the precise question, and much of the colloquy which ensued appears to us to have been wholly unnecessary and the limitations imposed by the court in the circumstances entirely proper.

No. 3 charges that after appellant's husband had testified the Government attorney in cross-examination attacked his character in an unfair and prejudicial manner. The basis of this is that Government counsel asked the witness if he had not lived with appellant when she was still married to another man. The witness had already testified, without objection, that he had lived with appellant in New York City prior to their own marriage. The question whether she was then unmarried or married to another, it seems to us, was immaterial, as was also the question whether the witness had been named corespondent in the divorce suit which resulted. The question asked by counsel for appellant had really no relation to the issue on trial. Witness was a sailor in the service of the Navy, and it is not unlikely that the purpose in calling him was that knowledge of that fact by the jury would create a favorable impression, just as the effort of the Government to discredit him was to avoid that effect. Probably he should not have been called at all, but having been called and having testified to his illegal relations with appellant prior to his marriage to her, it was not going too far to ask him if he had been named as corespondent in the divorce action brought by her former husband. We find nothing in the episode which was prejudicial.

No. 4. As a witness in her own behalf appellant was asked by her counsel if she had ever been *arrested* for any offense, and she testified she had not. Government counsel on cross-examination asked her if she had not been arrested for dis-

orderly conduct, to which she replied she had not. Clearly, this was within the scope of the direct examination. We see nothing in this either prejudicial or improper.

No. 5 calls our attention to a statement said to have been made by Government counsel in his closing address. If the statement was in fact made, it was highly improper, and should have been met with a rebuke from the court, but we are wholly unable to say whether the statement was in fact made, or to know the circumstances under which it was made, for there is nothing in the Bill of Exceptions in relation to the subject, and in inspection of the transcript, which we have made, shows clearly that the arguments of counsel were not stenographically reported, and in bringing this matter to our attention counsel relied upon defendant's affidavit and also newspaper statements, which of course we cannot consider.[4]

No. 8. There was enough evidence to warrant the verdict —even if that question were before us, though we think it is not.

Accordingly, on the whole case the conviction and judgment of the trial court must be and are affirmed.

Affirmed.

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[4] Morris v. District of Columbia, 75 U. S. App. D. C. 82, 124 F. (2d) 284; Moder v. United States, supra, note 2; Lucking v. United States, 14 F. (2d) 881, 883 (C. C. A. 7) cert, denied, 273 U. S. 749; Gantz v. United States, supra, note 2.

INDEX

CITATIONS

664409—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 258

CARMEN BEACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (see Pet. 21–24) is reported at 149 F. 2d 837.

JURISDICTION

The judgment of the Court of Appeals was entered June 18, 1945 (Pet. 2). The petition for a writ of certiorari was filed July 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

1. Whether petitioner is entitled to claim that reversible error resulted from allegedly improper remarks made by the prosecutor during his summation to the jury, although concededly the summation was not reported stenographically at the trial and does not appear in the record.

2. Whether the evidence is sufficient to support petitioner's conviction.

3. (a) Whether petitioner is entitled to claim reversible error upon the basis of the judge's charge to the jury, although she did not except to the charge and it does not appear in the bill of exceptions.

(b) Assuming that petitioner is entitled to make such claim, whether the charge was erroneous in the respect claimed.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), commonly known as the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to

become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on the third count (R. 2) of a four-count indictment charging violations of Section 2 of the Mann Act, *supra* (R. 1–2). The third count charged that on October 13, 1942, she wilfully and knowingly transported one Dorothy Smitley from petitioner's apartment in the District of Columbia to a hotel within the District for the purpose of prostitution (R. 2). Petitioner was sentenced to imprisonment for an indeterminate term of from one to three years and to pay a fine of $2,500 (R. 9). Upon appeal to the Court of Appeals for the District of Columbia, the conviction was reversed (R. 66). The only question considered was whether the Mann Act applies where the transportation occurs solely in the District of Columbia. The majority of the court held that it did not apply in that situation (R. 58–62; 144 F. 2d 533). This Court granted certiorari upon the Government's petition (323 U. S. 705), re-

versed the judgment of the Court of Appeals, and remanded the case to that court for consideration of the other grounds which petitioner had urged for reversal. 324 U. S. 193. The Court of Appeals has now considered those grounds and has affirmed the judgment of conviction (see Pet. 21–24).

The evidence in support of the conviction may be summarized as follows:

Dorothy Smitley testified that early in September 1942, she began to work in petitioner's dress shop in Washington, D. C., and at the same time she commenced living with petitioner in the latter's apartment (R. 11–12). Three days later petitioner suggested to Dorothy that she could earn more money by "selling herself" (R. 12). Although she had never practiced prostitution before (R. 18), she agreed to work for petitioner as a prostitute (R. 12). Petitioner gave her an alias for use in this work, and she immediately began to work as a prostitute, turning over one-half of her earnings to petitioner (R. 12–13, 14–15, 16, 17). From September until November 1942, when she was arrested, she practiced prostitution in petitioner's apartment and in various hotel rooms to which petitioner sent her (R. 19–24). When petitioner directed her to go to a hotel room, she sent her by taxicab and gave her the money for the fare (R. 14–15, 17, 26, 28). Early in November 1942, petitioner took Dorothy from the apartment to the Hamilton Hotel in

Washington where each of them performed acts of prostitution, petitioner receiving the payment (R. 15–16). This transportation was by taxicab and, as was customary, petitioner paid the fare (R. 16).

Petitioner took the stand in her own defense and testified that she never told Dorothy to go to a hotel for the purpose of practicing prostitution, that she never gave her money for cab fares, or received any money from Dorothy, except $4.00 for one week's rent. She admitted that she went with Dorothy to the Hotel Hamilton on the day involved, but did not remember who paid the cab fare. She further testified that the purpose of the visit to the hotel was to see a Mr. Brown who had invited them to the races. However, they did not go to the races. (R. 54–56.)

ARGUMENT

1. Petitioner contends (Pet. 2, 6–8) that reversible error resulted from allegedly improper remarks which she claims were made by the prosecuting attorney during his summation to the jury. This contention is plainly without merit.

Petitioner concedes (Pet. 6) that the summation was not taken down stenographically at the trial. It does not appear either in the bill of exceptions or in the typewritten transcript filed by petitioner (see Pet. 24). It is settled that alleged improper remarks asserted to have been made by government counsel, but which do not appear in the

record, present nothing for review. *Gantz* v. *United States*, 127 F. 2d 498, 504 (C. C. A. 8), certiorari denied, 317 U. S. 625; *Pielch* v. *United States*, 110 F. 2d 817, 822–823 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Paden* v. *United States*, 85 F. 2d 366, 368 (C. C. A. 8); *Hall* v. *United States*, 46 F. 2d 461 (C. C. A. 4); *Saxton* v. *United States*, 33 F. 2d 65, 67 (C. C. A. 8); *Lucking* v. *United States*, 14 F. 2d 881, 883 (C. C. A. 7), certiorari denied *sub nom. O'Neill, etc.* v. *United States*, 273 U. S. 749; *Hale* v. *United States*, 242 Fed. 891, 894 (C. C. A. 8). Nor may petitioner establish that the remarks were made by resort to her affidavit or to newspaper accounts, which are outside the record. Cf. *Morris* v. *United States*, 124 F. 2d 284 (App. D. C.); *Gantz* v. *United States, supra;* Cf. also *Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578; *Bono* v. *United States*, 124 F. 2d 724, 725 (C. C. A. 2); *Zell* v. *Bankers' Utilities' Co.*, 77 F. 2d 22, 26 (C. C. A. 9); *Leonard* v. *Field*, 71 F. 2d 483, 487 (C. C. A. 9); *Globe & Rutgers Fire Ins. Co.* v. *Draper*, 66 F. 2d 985, 992 (C. C. A. 9); *Hovland* v. *Smith*, 22 F. 2d 769, 770 (C. C. A. 9). Furthermore, assuming that the prosecutor's remark of which petitioner complains was made and that it was incorporated in the record, it would not avail petitioner, since the summation of defense counsel is absent. Under those circumstances, it is settled that there is no basis for appellate review of the incident. *Vause* v. *United States*, 53 F. 2d 346, 354 (C. C. A. 2),

certiorari denied, 284 U. S. 661; *Murphy* v. *United States*, 39 F. 2d 412, 414 (C. C. A. 8); *Hoffman* v. *United States*, 20 F. 2d 328, 329 (C. C. A. 8); *Silkworth* v. *United States*, 10 F. 2d 711, 721 (C. C. A. 2), certiorari denied, 271 U. S. 664.

2. There is no merit in petitioner's further contention (Pet. 2, 10–14) that the evidence is insufficient to sustain her conviction.

It does not appear that petitioner moved for a directed verdict at the close of all the evidence (see R. 56). However, passing this defect in petitioner's contention, we think that the evidence was sufficient, as was held by the Court of Appeals, to justify the verdict (see Pet. 24). Petitioner, in arguing this point, endeavors to isolate the testimony relating to the trip to the Hamilton Hotel (pp. 4–5, *supra*). But the record cannot be considered in this narrow aspect. Viewing the record in its entirety, there was ample evidence showing that Dorothy went to work for petitioner as a prostitute; that all arrangements for her work were made by petitioner; that Dorothy went to various hotels at petitioner's direction to practice prostitution; that petitioner paid her cab fares; and that petitioner shared in her earnings. When the Hotel Hamilton incident is considered in this setting, it is plain that there was enough evidence to warrant submission of the issues to the jury. Petitioner's further argument (Pet. 12–14), directed to the credibility of Dorothy's testimony, presents no question for appellate re-

view, since this was a matter for the jury to determine.[1]

3. Finally, petitioner contends (Pet. 2, 14–19) that the trial judge's instruction concerning the testimony of accomplices was confusing and erroneous.

The record discloses that petitioner did not except to the charge of the court (R. 57), and the charge does not appear in the bill of exceptions (see R. 56–57). Under these circumstances, it is plain that the question whether the charge was correct is not open for review. *Wong Tai* v. *United States,* 273 U. S. 77, 83; *Baker* v. *United States,* 115 F. 2d 533, 541 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Gallagher* v. *United States,* 82 F. 2d 721 (C. C. A. 8); *Goff* v. *United States,* 281 Fed. 822, 823 (C. C. A. 8); *Niebuhr* v. *United*

[1] There is no force in petitioner's assertion (Pet. 9) that there was a material variance between the allegation of count 3 that the offense charged therein occurred on October 13, 1942 (p. 3, *supra*), and the proof showing that the offense occurred early in November 1942 (pp. 4–5, *supra*). Although it is true that where time is of the essence, it must be alleged and established with precision, the general rule is that a variance between the date alleged and the date proved is not material, and proof of the commission of the offense on any date before the return of the indictment and within the period of the statute of limitations is sufficient. *Ledbetter* v. *United States*, 170 U. S. 606, 612; *Weeks* v. *Zerbst*, 85 F. 2d 996, 997 (C. C. A. 10); *Cornett* v. *United States*, 7 F. 2d 531, 532 (C. C. A. 8).

It is clear, also, that the variance in no way affected petitioner's substantial rights, in view of petitioner's admission that she went to the Hamilton Hotel by taxi with Dorothy on only one occasion (R. 54), which, as testified to by Dorothy, was early in November 1942 (R. 15).

States, 278 Fed. 523 (C. C. A. 7); *Hockett* v. *United States,* 265 Fed. 588, 589 (C. C. A. 9), certiorari denied *sub nom Wilson* v. *United States,* 254 U. S. 638.

But, in any event, as was held by the court below (see Pet 22), there is no merit in the contention. The trial court did charge the jury that although the asserted accomplices, including Dorothy Smitley, were not accomplices as a matter of law, their testimony was to be scrutinized "with care, and it is to be received with caution" (see Pet. 14). In this respect, the case is materially different from *Freed* v. *United States,* 266 Fed. 1012 (App. D. C.), relied on by petitioner (Pet. 14–16), for there the trial court refused the defendant's request for an instruction that the testimony of accomplices "ought to be received with suspicion, and with the very greatest care and caution," and charged the jury in the usual manner as to the credibility of witnesses. (266 Fed. at 1014.) Furthermore, it is settled that the victim in a Mann Act prosecution is not an accomplice to her transportation. *Gebardi* v. *United States,* 287 U. S. 112, 121; *United States* v. *Holte,* 236 U. S. 140, 145; *Mackreth* v. *United States,* 103 F. 2d 495, 496 (C. C. A. 5). Finally, the great weight of authority, including Mann Act cases, holds that the giving of an instruction as to the testimony of accomplices is not mandatory, but rests in the discretion of the trial court. *Pine* v. *United States,* 135 F. 2d 353, 355 (C. C. A. 5), certiorari denied, 320 U. S. 740; *Hanks* v. *United*

States, 97 F. 2d 309, 311–312 (C. C. A. 4); *United States* v. *Block,* 88 F. 2d 618, 621 (C. C. A. 2); *Wainer* v. *United States,* 82 F. 2d 305, 307–308 (C. C. A. 7); *United States* v. *Becker,* 62 F. 2d 1007, 1009 (C. C. A. 2); *Rachmil* v. *United States,* 288 Fed. 782, 785 (C. C. A. 2); *Hays* v. *United States,* 231 Fed. 106, 110 (C. C. A. 8), affirmed *sub nom. Caminetti* v. *United States,* 242 U. S. 470, 495.[2] Accordingly, even if the trial court had failed entirely to caution the jury as to accomplice testimony, it cannot be said that the omission would have been fatal. Manifestly, where the court does charge the jury on the question and the defendant by an absence of objection to the charge indicates his satisfaction with it, there is no basis for complaint.

CONCLUSION

The case was correctly decided below, and there is no real conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1945.

[2] The *Pine* and *Hays* cases involved the Mann Act.

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